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6 KARI SILVA BOWYER

7 UNITED STATES BANKRUPTCY COURT

8 FOR THE NORTHERN DISTRICT OF CALIFORNIA

9 SAN JOSE DIVISION

11 **In re**
12 **THUAN-VU D HO,**

Case No. 14-50354 ASW-7
Chapter 7

13 **Debtor.**

15 **KARI SILVA BOWYER, Trustee**
16 **of the Bankruptcy Estate of**
17 **Thuan-Vu D Ho,**

18 **Plaintiff,**
19 **vs.**

20 **LUU PHUONG NGUYEN aka**
21 **LUUPHUONG NGUYEN, BAO QUOC**
22 **NGUYEN and MINHDUC T. LUU,**

23 **Defendants.**

ADVERSARY PROCEEDING
NO. 14-05039

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF EX
PARTE APPLICATION FOR ORDER
GRANTING TEMPORARY RESTRAINING
ORDER AND PRELIMINARY INJUNCTION

Date: May 22, 2014
Time: 2:15 p.m.
Place: 280 South First St.
San Jose, California
Judge: Hon. Arthur S. Weissbrodt

25 Plaintiff, Kari Silva Bowyer, Trustee in bankruptcy of the
26 estate of the above Debtor ("Plaintiff"), respectfully submits the
27 following Memorandum of Points and Authorities in support of
28 Plaintiff's request for a Preliminary Injunction in connection with

Points and Authorities in Support
of Ex Parte Application for TRO

1 the Ex Parte Application for Order Granting Temporary Restraining
2 Order and attached Declaration of Marlene G. Weinstein ("MGW.Dec.")
3 in support thereof filed with the Court on April 16, 2014, and
4 entered on the court docket as document number 3.

5

6 **FACTS OF UNDERLYING COMPLAINT**

7

8 On January 30, 2014, the above Debtor filed a voluntary
9 petition for relief under Chapter 7 of the Bankruptcy Code, and
10 Plaintiff was appointed Chapter 7 Trustee.

11

12 Plaintiff initiated the within adversary proceeding based upon
13 Debtor's transfer of the Real Property to Luuphuong within one (1)
14 year of the filing of the Bankruptcy Case, which property was
15 purchased during Debtor's marriage to Luuphuong. Plaintiff
16 contends the Real Property, the Proceeds of Sale and the remaining
17 Proceeds of Sale therefrom were and are community property that is
18 recoverable for the benefit of the estate under 11 U.S.C. §548.
19 See **MGW.Dec.Ex.D.**

20

21 Plaintiff contends that Debtor and Luuphuong were married on
22 or about November 17, 2008, and separated on or about January 5,
23 2013,, and that during their marriage, on or about November 13,
24 2009, they purchased the real property located at 3482 Lapridge
25 Lane, San Jose, California ("the Real Property") for \$630,000.00.
26

27

28 On or about February 4, 2013, less than one (1) year prior to
the bankruptcy filing, Debtor executed an Interspousal Transfer

1 Grant Deed, recorded February 14, 2013, document number 22093512,
2 in the Santa Clara County Recorder's Official Records, pursuant to
3 which Debtor transferred all of his right, title and interest in
4 the Real Property to Luuphuong, a married woman as her sole and
5 separate property. **[MGW.Dec.Ex.A]**.

6

7 On or about April 2, 2013, Luuphuong filed a Petition for
8 Dissolution of Marriage in Santa Clara Superior Court, as Case No.
9 1-13-FL-164502 ("Family Law Case"). On or about June 5, 2013, less
10 than one (1) year prior to the bankruptcy filing, a Judgment of
11 Dissolution was entered in Family Law Case ("the Judgment"), a true
12 and correct copy of which is attached hereto as Exhibit A.

13

14 The Judgment provided, in relevant part, for Luuphuong to be
15 awarded, as her sole and separate property, various property
16 including, but not limited to the Real Property, other real
17 property located on White Road in San Jose, a 2005 Toyota Camry, a
18 2010 Toyota Highlander ("Highlander"), any and all credit cards or
19 other debts in her name alone, and all financial accounts in her
20 name or jointly with another other than with Debtor.

21

22 At the time the Real Property was transferred to Luuphuong,
23 the debts secured by the Real Property totaled less than
24 \$500,000.00. On April 4, 2014, Luuphuong sold the Real Property
25 for the sum of \$950,000.00 ("Proceeds of Sale") and that the
26 Proceeds of Sale was and is at all times a community property asset
27 and property of the bankruptcy estate **[MGW.Dec.Ex.B,C]**.

28

1 The Judgment also provided, in relevant part, for Debtor to be
2 awarded, as his sole and separate property, a Cancun timeshare, all
3 furniture, furnishings, and personal property belongings including
4 jewelry currently in his possession, the business known as "Prima
5 Dental Care" including any and all assets and/or liabilities
6 thereon, any and all credit cards or other debts in Husband's name
7 alone, and all financial accounts in Husband's name, or jointly
8 with another other than Wife.

9

10 On February 14, 2014, just over eight (8) months after entry
11 of the Judgment, in addition to the within bankruptcy case, Debtor
12 caused to be filed a voluntary petition for relief under Chapter 7
13 of the Bankruptcy Code on behalf of Thuan-Vu Dinh Ho, DMD, Inc. dba
14 Prima Dental Care (the "Corporation") in which Debtor is sole
15 shareholder, in the Northern District of California, San Francisco
16 Division, as Case No. 14-30226 (the "Corporate Bankruptcy Case")
17 and an order for relief was entered.

18

19 In connection with the filing of the Bankruptcy Case, Debtor
20 listed a debt of \$996,935.79 as wholly unsecured on Schedule D,
21 which debt Plaintiff asserts was incurred by the Corporation in or
22 about 2006, that Debtor guaranteed the obligation, and with respect
23 to which the Corporation defaulted as early as May 2012, prior to
24 Debtor's transfer of the Real Property to Luuphuong.

25

26 Plaintiff contends that the facts and circumstances
27 surrounding the transfer of the Real Property from Debtor to
28 Luuphuong would support a finding by this Court that said transfer

1 is avoidable as a fraudulent transfer and recoverable for the
2 benefit of the bankruptcy estate.

3

4 **LEGAL ARGUMENT**

5

6 I. **The Four-Part Traditional Test for a Preliminary Injunction**

7 An injunction is an equitable remedy. "The basis for
8 injunctive relief (preliminary or permanent) in the
9 federal courts has always been *irreparable injury* and the
10 *inadequacy of legal remedies.*" [Weinberger v. Romero-
11 Barcelo (1982) 456 US 305, 312, 102 S.Ct. 1798, 1803
12 (emphasis and parentheses added); Stanley v. University
13 of So. Calif. (9th Cir. 1994) 13 F3d 1313, 1320] "The
14 Rutter Group, page 13-17, ¶13:38.

15

An injunction never issues as a matter of course: "In each
13 case, a court must *balance* the competing claims of injury
14 and must consider the *effect on each party* of the
15 granting or withholding of the requested relief. ... The
Rutter Group, page 13-17, ¶13:39.

16

17 As set forth in Perfect 10, Inc. v. Google, Inc. (9th Cir.
18 2011) 633 F.3d 976,

19

A plaintiff seeking a preliminary injunction must
20 establish [(1)] that he is likely to succeed on the
21 merits, [(2)] that he is likely to suffer irreparable
22 harm in the absence of preliminary relief, [3] that the
23 balance of equities tips in his favor, and [(4)] that an
injunction is in the public interest." *Winter v. Natural
Res. Def. Council. Inc.*, 555 U.S. 7, 129 S.Ct. 365, 374,
172 L.Ed.2d 249 (2008)." Perfect 10, at p. 979.

24

This four-part or "traditional test" has been held to
apply whenever preliminary injunctive relief is sought.
[See *Winter v. Natural Resources Defense Council, Inc.*,
supra, 555 US at 20, 129 S.Ct. at 374 – to enjoin U.S.
Navy from violations of environmental laws; ...; see also
Perfect 10, Inc. v. Google, Inc., supra, 653 f3d at 979-
980] The Rutter Group, p. 13-19, ¶13:44.

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27

28

1 || **II. Plaintiff is Likely to Succeed on the Merits**

2
3 Plaintiff has alleged that the transfer of the Real Property
4 from Debtor to Luuphuong is an avoidable transfer of property of
5 the bankruptcy estate recoverable as a fraudulent transfer pursuant
6 to 11 U.S.C. § 548(a).

7
8 The Plaintiff must first prove that the Real Property was
9 property of the bankruptcy estate. 11 U.S.C. §541(a)(2) provides
10 that all interests of the Debtor in community property are property
11 of the bankruptcy estate.

12
13 Defendants, and specifically Luuphuong, cannot dispute that
14 the Real Property was purchased during their marriage, that that
15 title was taken in both her name and that of the Debtor, and
16 further, that virtually payments of the debt secured by the Real
17 Property were paid with earnings of either Luuphuong or Debtor.

18
19 California Family Code §2581 (hereinafter "F.C"), provides, in
20 relevant part, that "... property acquired by the parties during
21 marriage in joint form, .. is presumed to be community property."
22 F.C. §760 provides that, "generally, all property, real or
23 personal, wherever situated, acquired by a married person during
24 marriage while domiciled in California is community property.
25 Therefore, all earnings acquired during marriage are community
26 property. Accordingly, it would be difficult, if not impossible,
27 for Luuphuong to dispute the allegation that the Real Property was
28 a community property asset.

1 Another element of 11 U.S.C. §548(a) that Plaintiff must prove
2 is that the transfer of the Real Property by Debtor to Luuphuong
3 was made within two (2) years before the filing of Debtor's
4 bankruptcy. As has previously been stated, Debtor filed his
5 bankruptcy case less than one year after he transferred the
6 community property Real Property to Luuphuong.

7

8 To prevail on a claim under 11 U.S.C. §548(a), and based upon
9 the facts of the within case, it is not difficult for Plaintiff to
10 prove that either (A) Debtor made the transfer with actual intent
11 to hinder, delay, or defraud any entity to which the debtor was or
12 became, on or after the date of the transfer, indebted, or (B) that
13 Debtor received less than a reasonably equivalent value in exchange
14 for such transfer; and that Debtor that the transfer was made and
15 incurred by the Debtor (i) when he was insolvent and/or such
16 transfer rendered him insolvent ...

17

18 The facts set forth in Debtor's bankruptcy filing and also in
19 the Corporate Bankruptcy Case, provide evidence that Debtor was
20 insolvent (or became insolvent) when he made the transfer to
21 Luuphuong in that he was a guarantor of a corporate obligation on
22 which the Corporation had defaulted in excess of \$1 million. At
23 the time of the Interspousal Transfer Grant Deed, Debtor received
24 nothing in exchange for transferring the Real Property, which had
25 approximately \$400,000.00 in equity, to Luuphuong. To the extent
26 Luuphong asserts that Debtor received his dental practice in
27 return, the fact is that it had no value when it was transferred by
28 Luuphuong to the Debtor pursuant to the Judgment of Dissolution.

1 Its debts far exceeded its assets resulting in the Corporation
2 filing bankruptcy less than one (1) year after the transfer of the
3 Real Property.

4

5 As to Luuphuong's parents, defendants, Bao Quoc Nguyen and
6 Minhduc T. Luu ("Parents"), to the extent the transfer of the Real
7 Property is avoided, the transfer of \$150,000.00 by Luuphuong to
8 her Parents on or after April 4, 2014, is an avoidable post-
9 petition transfer of property of the estate under 11 U.S.C. §549.

10

11 Based upon the foregoing, Plaintiff is likely to prevail in
12 the adversary proceeding against all Defendants.

13

14 **III. Plaintiff is Likely to Suffer Irreparable Harm**

15

16 From sales proceeds of \$950,000.00, and a mortgage of less
17 than \$500,000.00, Luuphuong initially stated that she has only
18 about \$100,000.00, not including the \$150,000.00 transferred to her
19 Parents. She has now stated that she has none of the Proceeds of
20 Sale remaining and that all of it has been disbursed. The
21 Defendants have seemingly ignored all orders from this Court. In
22 connection with the filing of the within Memorandum of Points and
23 Authorities, Plaintiff will seek an order for turnover to the
24 Trustee to the extent there are any funds remaining from the
25 Proceeds of Sale in the possession of the Defendants.

26

27 ///

28 ///

1 IV. **The Balance of Equities Tips in Plaintiff's Favor**

2

3 Defendants lose nothing if Plaintiff is granted the relief
4 requested and/or if Plaintiff is granted the additional relief
5 requested for turnover of whatever funds are still in possession of
6 the Defendants. On April 30, 2014, and notwithstanding the
7 previous orders entered by this Court as well as the communications
8 between Luuphuong and Plaintiff's counsel, Luuphuong, through
9 counsel, has now stated that she has nothing left from the Proceeds
10 of Sale.

11

12 V. **An Injunction is in the Public Interest**

13

14 The Bankruptcy Code provides for the administration of the
15 assets of a bankruptcy estate for the benefit of a debtor's
16 creditors. In the event the preliminary injunction requested
17 herein, as well as the turnover order, are not granted by this
18 Court, it is very possible that Debtor's conduct in transferring
19 away his only asset out of the reach of his creditors, and his ex-
20 wife's subsequent sale of the Real Property and transfer of the
21 Proceeds of Sale for her benefit only (and that of her Parents),
22 will result in creditors of Debtor's bankruptcy estate receiving
23 nothing on their claims. Such conduct should not be allowed to
24 continue for the integrity of not only the bankruptcy system, but
25 all laws and court orders that are issued. The public will not be
26 served by such conduct.

27

28 ///

CONCLUSION

Plaintiff submits that this is a proper case for a preliminary injunction as previously requested, as well as for entry of an order requiring Defendants to turnover to Plaintiff any and all funds remaining from the Proceeds of Sale.

Respectfully submitted,

Dated: April 30, 2014

LAW OFFICE OF MARLENE G. WEINSTEIN

By: /s/ Marlene Gay Weinstein
MARLENE G. WEINSTEIN
Attorney for Plaintiff
Kari Silva Bowyer, Trustee

CERTIFICATE OF SERVICE

I declare as follows:

I am employed in the County of Contra Costa; I am over the age of 18 years, and not a party to the within action; my business address is 1350 Treat Blvd., Suite 420, Walnut Creek, California 94597. I am readily familiar with my employer's business practice for collection and processing of correspondence for mailing with the United States Postal Service.

On April 30, 2014, I served the following documents:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF EX PARTE APPLICATION FOR ORDER GRANTING TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

on each party listed below in the manner or manners described below and addressed as follows:

Michael Chinh Vu, Esq.
Vu.S.A. Law Offices, APC
142 East Mission Street
San Jose, CA 95112
michaelvu@vusalaw.com

X BY ELECTRONIC MAIL: by transmitting via email said document(s) listed above to the email address(es) set forth above.

X BY ECF EMAIL NOTIFICATION: by way of the court's ECF email notification to the participating parties set forth below.

United States Trustee
280 South First Street
Room 268
San Jose, CA 95113

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 30th day of April, 2014 at Walnut Creek, California.

/s/ Marlene Gay Weinstein
MARLENE G. WEINSTEIN